

VENTURA
SUPERIOR COURT
FILED

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Executive Officer and Clerk Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

SCOTT HOWARD and JULI SCOTT,

Plaintiffs,

vs.

CITY OF SAN BUENAVENTURA and
DOES 1 through 51. inclusive,

Defendants,

AND ALL RELATED CROSS
ACTIONS.

Case No.: 56-2016-00489832-CU-EI-VTA

STATEMENT OF DECISION

This matter came on calendar regularly for trial on March 5 and March 6, 2019 before the undersigned court sitting without a jury. Mr. Max Engelhardt appeared for plaintiffs Scott Howard and Juli Scott. Mr. Scott Ditfurth and Ms. Alexandra Baca appeared for defendant, City of San Buenaventura. Testimony was taken, evidence received, and the matter was argued by counsel. Both sides have timely requested a Statement of Decision, and the court issued its Statement of Intended Decision on March 15, 2017. Plaintiffs have timely filed objections, and the court now issues its Statement of Decision.

1 The case against the City is part of a larger case including the State of
2 California and The California Department of Parks and Recreation. The case
3 against the City, however, has been bifurcated for resolution of the threshold issue
4 of inverse condemnation as alleged against the City.

5 Plaintiffs are husband and wife who are the owners of the residence and real
6 property located at 1267 Norwich Lane in the Pierpont area of Ventura. The area
7 where they live is sometimes known as "The Lanes," and consists of twenty seven
8 narrow streets which run perpendicular to the Pacific Ocean, and which terminate
9 at the beach. The lots on the various lanes are small, and the residences
10 historically were beach cottages. Given the desirability of property adjacent to and
11 near the beach, the cottages have been replaced over time with upscale two and
12 three story permanent residences. Although proximity to the beach is regarded as
13 desirable, The Lanes also suffer the detriments of wind and sand. Windblown sand
14 has been a constant problem over the years, and such sand has formed drifts which
15 have negatively impacted retaining walls. Windblown sand is also a constant
16 presence which accumulates on the exterior of Pierpont properties causing
17 inconvenience to residents, and damage to the exterior of their property depending
18 on their proximity to the beach, i.e. property immediately adjacent to the beach is
19 generally more impacted than property a block away.

20 For years, and up to 1999, the City would react to complaints about blowing
21 and accumulating sand by periodically bulldozing the accumulated sand, and
22 pushing it away from the residences and back towards the ocean. Parenthetically,
23 running parallel to the coast and adjacent to the properties closest to the ocean was
24 Shore Drive, a dedicated public easement, although a thoroughfare in name only,
25 and not one ever paved or used for vehicular or organized foot traffic. The
26 clearing of the sand, as described herein, was stopped in 1999, allegedly due to
27 objections from the Coastal Commission. Without the City program to remove
28 sand, the combination of wind and sand led to blowing sand, and the formation of

1 sand dunes. Both of these factors negatively impacted homes in The Lanes, but
2 especially those at the end of individual streets which were beachfront properties.

3 In 2010, 16 property owners sued the City alleging that the City's failure to
4 engage in sand management activity amounted to a nuisance. This case (the so-
5 called *Wilson* case) resulted in a finding that failure to remove the sand was a
6 legally cognizable continuing nuisance, and a judgment adverse to the City on this
7 issue was entered. That judgment required the City to abate the nuisance. To
8 conclude the litigation, the parties negotiated a settlement agreement whereby the
9 City would engage in a one-time removal of sand on and adjacent to Shore Drive,
10 and thereafter push accumulated sand away from the property of the plaintiffs on a
11 semi-annual basis. Those plaintiffs who wished to avail themselves of this semi-
12 annual sand removal would split the cost of doing this with the City (believed to be
13 \$1,000.00/parcel/year). A number of the property owners elected to participate in
14 this ongoing project. The present plaintiffs, Mr. Howard and Ms. Scott, were not
15 party plaintiffs in the *Wilson* case, nor were they participants in the settlement
16 agreement.

17 Mr. Howard and Ms. Scott bought their property in 2008. It is not a
18 "frontline" property, but one which is the second home from the beach on Norwich
19 Lane. Since the time of the acquisition of their home, plaintiffs have been plagued
20 by wind blown sand from the nearby beach. It has impeded the operation of their
21 garage door, and the entrance gate to their residence. It has infiltrated into their
22 home through open windows. It has killed exterior grass and landscaping. In Mr.
23 Howard's opinion, it is something which would require disclosure to a prospective
24 buyer, and (also in his opinion) has resulted in a 10% diminution of the value of his
25 home. Efforts to resolve the issue with the City were not successful (and those
26 efforts are not a factor in the Court's decision in this case). The result has been
27 the present action for inverse condemnation.

28 Inverse condemnation is a cause of action which will lie against a public

1 entity, the elements of which are as follows: (1) plaintiff is the owner of property;
2 (2) there is a public project or work of improvement; (3) there is damage to
3 plaintiff's property; and (4) the damage was proximately caused by the defendant
4 public entity's project or work of improvement. The parties agree that plaintiff's
5 were the owners of the Norwich Lane property. They disagree on the remaining
6 three elements.

7 The court finds that the maintenance agreement resulting from the *Wilson*
8 litigation does amount to a public project. Counsel for the City argues that there
9 was no recognized project, and that the City's conduct was analogous to that in
10 *Moerman v. State*, 17 Cal.App.4th 452. The court disagrees. There, the Court of
11 Appeal found that the elk in question were not "controlled" by the State, and that
12 efforts to relocate them where they had potential access to plaintiff's property was
13 not enough to qualify as a public project. This case is different. The City's sand
14 maintenance program amounted to a direct control of the sand it was moving. As
15 will be discussed later on, causation is an issue, but the sand maintenance
16 agreement was a public project for the immediate benefit of the participating
17 homeowners, but also having the potential of impacting nearby landowners.

18 More specifically, the Court finds that as alleged by the Plaintiffs, the City
19 was taking affirmative action to further a public project. It was furthermore
20 moving the sand for the benefit of a portion of the public. It was a small portion of
21 the public, but the public nonetheless.

22 The elements of ownership of property, public project and damage have
23 been satisfied. In stating this, the court gives short shrift to the defense contention
24 that Plaintiffs property has not been damaged. Mr. Howard has testified that he
25 believes that the value of his property has been diminished by the constant
26 presence of sand and its impact on the exterior of his property. That is good
27 enough. The real issue in the case is that of causation.

28 There is extensive authority for the proposition that the public project must

1 be shown to have caused the damage to the Plaintiff's property. This is not a
2 difficult concept, and the appellate cases discussing this requirement are all fact
3 driven. Implicit in analyzing this issue is that if Plaintiff's damage would have
4 occurred without the claimed impact of defendant's public project, there can be no
5 recovery. Stated another way, defendant's project must be shown to have made
6 existing conditions worse such that plaintiff's property was damaged. See
7 *Shaeffer v. State of California*, 22 Cal.App.3d 1017, and *Tri-Chem v. Los Angeles*
8 *County Flood Control*, 60 Cal.App.3d 306. Although these cases were decided in
9 the era of "but for" causation, and causation is now a "substantial factor" standard,
10 the analysis and the result is no different.

11 Here, before the *Wilson* settlement, wind blew sand such that it created drifts
12 against the retaining walls. There is only the testimony of Mr. Howard as to the
13 extent of sand intrusion on the properties further down along Norwich. He
14 testified that there was no sand intrusion in his rear yard when he purchased the
15 property in 2008, but that there were multiple complaints to the City since 2009.
16 The *Wilson* settlement and its implementation did not occur until 2012. A
17 reasonable inference from this is that there was sand intrusion before the 2012
18 settlement agreement.

19 The *Wilson* settlement is executed in 2012 and all the sand is removed
20 adjacent to Shore Drive. There is a year of no sand removal, and then comes the
21 semi-annual sand removals adjacent to the properties of the opt-in homeowners.
22 The intrusion onto Plaintiffs' property returns. From this, Plaintiffs argue that the
23 "hopscotching" created by the selective sand removal caused the post 2012
24 intrusion of sand onto their property. That is the Plaintiffs' evidence regarding
25 causation. Defendant offers the testimony of Philip Shaller, a geologist and
26 engineering geologist. His qualifications provide a sufficient foundation for him to
27 give opinion testimony, and he has done that. After explaining "fetching" as the
28 concept by which wind causes the movement of sand, he concludes that The City's

1 semi-annual removal of sand was not a factor in causing sand intrusion onto
2 Plaintiffs' property. The culprit, in his opinion, is the prevailing winds that cause
3 the movement of sand. The court finds this to be a persuasive explanation, and
4 finds that Mr. Shaller is a persuasive witness. There is no competing testimony or
5 evidence to suggest that the City's project has either caused the intrusion of sand,
6 or accelerated its progress. As the owner of property, Mr. Howard is entitled to
7 offer an explanation as to the value of his property. He is not, however, qualified
8 to offer an opinion as to how the City's project caused the movement of sand onto
9 his property. In sum, the court concludes that Plaintiffs have not proven the
10 necessary element of causation to entitle them to a recovery.

11 This is not a decision easily reached. The Plaintiffs have sustained damage
12 through no fault of their own. Their testimony about their reluctance to sue the
13 City, and the reasons for this reluctance, is credible. The court is nonetheless
14 persuaded that the necessary causal link is not proven.

15 Judgment is in favor of Defendant City of San Buenaventura. Defendant is
16 the prevailing party, and is entitled to its statutory costs of suit.

17 Counsel for defendant is directed to prepare and to submit a form of
18 Judgment.

19 Dated: April 18, 2019


HENRY J. WALSH
Judge of the Superior Court